SERVED: November 9, 2006

NTSB Order No. EA-5258

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of November, 2006

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JOHNNY H. BENNETT, Respondent.	Docket SE-17393

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty issued on November 18, 2005, following an evidentiary hearing.[1] By that decision, the law judge affirmed an order of the Administrator revoking respondent's Second Class medical certificate, suspending his Airline Transport Pilot certificate for 90 days, and suspending for 60 days any other airman certificates, for respondent's

[1] The initial decision, an excerpt from the hearing transcript, is attached.

violation of sections 61.15(e) and 67.403(c)(1) of the Federal Aviation Regulations (FARs).[2] We deny the appeal.[3]

The Administrator's complaint arises as a result of a motor vehicle accident that occurred around 11 p.m. on May 16, 2004. Exhibit (Ex.) A-2. Respondent, a driver involved in the multi-car accident, was injured and taken to the hospital where he received treatment. Respondent's blood alcohol level was found to be .14-.15%, above the legal limit of .08%. The traffic officer at the scene, Officer John Lemas of the California Highway Patrol, issued citations to respondent at the hospital. He testified that he showed respondent Highway Patrol Form DS-367 entitled "Administrative Per Se Suspension/Revocation Order and Temporary Driver License" (hereafter, Form DS-367), and explained it to him. He obtained respondent's thumbprint on the form.

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[2] Section 61.15(e) –- 14 C.F.R. Part 61 -- requires the filing, within 60 days, of a written report of any motor vehicle action. A motor vehicle action is defined at 61.15(c) as: a conviction for the violation of any Federal or State statute relating to the operation of a motor vehicle while intoxicated, impaired or under the influence of alcohol or drugs; or the cancellation, suspension, or revocation or denial of an application for a motor vehicle license for a cause related to such operation. Section 67.403(c)(1) –- 14 C.F.R. Part 67 -- provides, as pertinent, that an incorrect statement made in support of a medical application on which the FAA relies is grounds for revocation of the medical certificate issued in reliance on that statement. The law judge approached this charge as one alleging an intentionally false or fraudulent statement but, as the Order of Revocation indicates, the rule addresses "incorrect" information. The error is immaterial to our opinion.

[3] In his appeal, respondent asks for oral argument. That request is denied. No basis for such extraordinary relief has been presented. Respondent's additional request for a new hearing is also denied, given our resolution of the issues in this appeal.

Exs. R-2, A-1, and A-2. Officer Lemas also issued respondent a citation for drunk driving and other violations in connection with the accident and obtained respondent's signature on that citation. Officer Lemas testified that he also explained the citation to respondent. Ex. R-1. Officer Lemas testified that he folded both the Form DS-367 and the citation and put them in respondent's wallet, which was in a bag with respondent's other personal effects at the end of his hospital bed. Respondent remained in the hospital overnight and left the next morning.

Form DS-367 suspends a recipient's driver's license and also serves as a new, temporary license.[4] It clearly states that the recipient's driving privileges will be "suspended or revoked effective 30 days from the issue date of this order" and that the action is being taken pursuant to the California Vehicle Code for "driving under the influence of alcohol[.]" Exs. A-1 and R-2. The form also indicates that within 10 days of receipt of the form a hearing must be requested in order to stay the suspension or revocation. If no hearing is requested, the temporary license expires by its terms, and, therefore, 30 days after issuance of the Administrative Per Se suspension order, the driver no longer has permission to operate a motor vehicle in the State. Id.

Respondent claimed that due to his serious injuries he did

[4] The permanent license, if located, is taken by the police. If a license is not surrendered, or, as here, cannot be found, procedure requires that the officer obtain the driver's thumbprint. Respondent's thumbprint is visible on the Form DS-367. Ex. A-2.

not recall much of what happened at the hospital and specifically did not recall receiving the Form DS-367. He claimed that he did not look in his wallet for quite some time, and that when he did discover the Form DS-367, on June 14, 2004, he called the Department of Motor Vehicles (DMV) and was told that there were no pending actions against his license.[5] He denied ever receiving any citations. On June 30th, or approximately 15 days after the suspension went into effect, respondent applied to renew his medical certificate.[6] On the form, he checked "no" to question 18(v) regarding whether he had any "history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation or revocation of driving privileges[.]"[7]

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[5] However, according to the terms of the Form DS-367, respondent's drivers license was suspended on or about June 16, 2004. DMV records indicate respondent's license was suspended for a 4-month period. Ex. A-3.

[6] The Administrator alleges in the complaint that respondent was seeking a Second Class medical certificate, but the document itself indicates respondent was seeking a First Class certificate. Ex. A-4. Respondent claims that the law judge's refusal to consider evidence on this point was prejudicial because, in respondent's view, the law judge somehow held against him the failure to explain on the record why he applied in June, rather than the renewal date for the Second Class certificate, which was in September. We disagree. Our review of the record indicates no error by the law judge, and, in any event, it is clear to us that the distinction did not materially impact the law judge's ultimate conclusions.

[7] There was considerable discussion in the record about other allegedly false statements on respondent's application. For example, he testified that he believed he was right in answering "no" to a question regarding whether he had visited any health professionals as he did not consider his emergency room treatment as a result of the accident to qualify. However, falsification of these answers was not charged in the complaint and, therefore,

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Respondent did not report his receipt of the Form DS-367 suspension to the FAA within 60 days. On August 24, 2004, respondent received a Letter of Investigation from the FAA concerning California's action against his driver's license and noting respondent's failure to file the report required by § 61.15(e). Respondent's counsel sent a response to the FAA on September 3, 2004. Ex. A-6. In that response, he asserted that respondent contacted the California DMV within the 10-day period to request a hearing. This statement was not validated at the hearing. The letter also stated that the investigating officer (Officer Lemas) did not issue a notice of suspension or revocation and did not confiscate respondent's license, and, thus, "Mr. Bennett did not know of any action to report to the FAA." [8] That claim directly contradicts respondent's own testimony at the hearing that he found the Form DS-367 in his wallet on June 14th.

The law judge rejected much of respondent's testimony. In rendering his decision, he explained that he had taken into consideration the "demeanor of the witnesses," evaluated the

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was relevant only insomuch as they bear on an assessment of respondent's credibility. We think the law judge adequately addressed such matters.

[8] Respondent's brother, while continuing to act as counsel, testified at the hearing that he later discovered that some of the information in his September 3, 2004 letter was incorrect. (At this point in the hearing, respondent was also represented by his brother-counsel's paralegal, who was permitted by the judge to question counsel as witness.)

"reliability and forthrightness of the testimony," and taken into account the inherent self-interest of the various witnesses. He specifically found that, at least as of June 14th (when respondent testified that he found the Form DS-367 and contacted the DMV to find out the status of his license), "any individual ... would realize that he had been served with an Administrative Order of Suspension of his motor vehicle driver's license." The law judge clearly rejected as not credible respondent's claim that he was unaware of the administrative suspension when he filled out his FAA medical application. The law judge found the FAR violations proven by a preponderance of the evidence.

On appeal, respondent argues, essentially, that the law judge's decision is not supported by the evidence. Respondent's argument depends, in significant part, on his exculpatory claims that (1) he was unaware of the Form DS-367 suspension order until June 14th, when he found it in his wallet; and (2) after that discovery, and after telephoning the DMV upon the discovery, he believed that notwithstanding the language on the face of the Form DS-367 he had not received any administrative suspension order.

The critical issue in this case is what respondent knew on June 30th when he completed the medical application. The law judge made a negative credibility assessment of respondent's exculpatory claim that he was unaware of the administrative suspension when he certified the veracity of his medical certificate application on June 30, 2004. Credibility

determinations by the law judge are not reversed unless they are arbitrary, capricious, or clearly erroneous. Administrator v. Smith, 5 NTSB 1560, 1563 (1986), and cases cited there. Respondent demonstrates no basis, nor do we discern any, to overturn the law judge's credibility determinations. Indeed, we think respondent's testimony amply demonstrates significant bases to reasonably question respondent's candor or veracity regarding the relevant events.

Respondent also makes numerous arguments that, collectively, amount to a claim that the law judge denied him a fair hearing. For example, respondent alleges that he was prevented from securing through subpoena the attendance of necessary DMV witnesses, and that the law judge refused to permit him to admit relevant evidence and afforded greater latitude to the Administrator's counsel. Respondent has not shown that the law judge abused his discretion in exercising his legitimate control over the admissibility of relevant evidence, scope of questioning, or confining argument to issues he considered germane to the complaint. In this regard, of course, determinations of relevance and admissibility of proffered evidence rests in the sound discretion of the law judge. Administrator v. Santana, NTSB Order No. EA-5152 at 3 (2005); see also 49 C.F.R. 821.35(b). We have considered respondent's arguments pertaining to the fairness of his hearing, and, based on the record and the reasons articulated in the Administrator's appeal brief, we find no merit to any of them.

Finally, respondent also contests the service of the Form DS-367 at the hospital, and argues that the DMV did not receive it until June 30th (and only then was it made effective retroactively to June 15th). Respondent's argument that Officer Lemas did not serve the Form DS-367 or the alcohol-related traffic citation properly, or at all, and that Officer Lemas committed perjury when he said he did, is not persuasive. The law judge directly addressed these arguments, and we agree with the law judge's analysis. Similarly, the DMV's date of receipt of the Form DS-367, and its logging it into its database, is also not germane given the record in this case. The only possible relevance it could have is to bolster respondent's claim to have relied on the purported statement from the DMV official regarding the status of his license. The law judge clearly rejected respondent's exculpatory claims, and, as we have said, this finding is consistent with the record and the clear language printed on the Form DS-367 that prompted respondent's call to the DMV.

In sum, after a careful review of the record, we have no hesitation in affirming the law judge's credibility-based decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The revocation and suspension of respondent's certificates shall begin 30 days after the service date indicated

on this opinion and order.[9]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

[9] For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. §§ 61.19(g) and 67.415.